A **SURUHANJAYA TENAGA v. STRONG ELEGANCE SDN BHD**

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
AZIMAH OMAR JCA
AZHAHARI KAMAL RAMLI JCA
B [CIVIL APPEAL NO: W-01(NCvC)(W)-168-03-2023]
29 FEBRUARY 2024

Abstract – *In a contingent contract where time is of the essence in respect of the occurrence of its contingency, allowance of conditional extensions of time would not render time to be at large. The party required to ensure the occurrence of the contingency must ensure the contingency occurred within the extended deadlines.*

D ***CONTRACT:*** *Contingent contract – Non-fulfilment of conditions precedent – Company acting as corporate vehicle required to procure lease of land for 23 years ('lease') within prescribed deadline before letter of award of project could be awarded by Energy Commission of Malaysia ('EC') – Company failed to procure lease within original and extended deadlines – EC decided to withdraw and terminate contingent contract – Appeal against withdrawal and termination of contingent contract – Whether contingent contract actually commercial contract – Whether company's reliance on s. 33 of Contracts Act 1950 ('CA') misplaced – Whether there was misinterpretation on s. 36 of CA – Whether incumbent upon EC to wait until company successfully procure lease – Whether allowance of conditional extensions of time caused time to be at large – Whether EC acted in manner which caused company to legitimately expect and accept delay in procuring lease had been accepted*

STATUTORY INTERPRETATION: *Contracts Act 1950, s. 36 – Interpretation – Contingent contract – High Court Judge's interpretation removed stipulations regarding 'time' and only put emphasis on stipulations regarding 'possibility' – Whether contractual time limitations should not bar performance of contingent contract – Whether there was misinterpretation – Whether interpretation would go against spirit of Contracts Act 1950 and intention of Parliament*

H The appellant was the Energy Commission of Malaysia, while the respondent, Strong Elegance Sdn Bhd, was a company incorporated to act as a corporate vehicle. Pursuant to the 11th Malaysian Plan, the appellant undertook initiatives to increase the capacity of large scale solar photovoltaic installation to achieve the Government's objective of reducing the country's carbon footprint (and emission) by increasing the use of renewable energy, *ie*, solar energy. One of the initiatives was the 'LSS project'. For the said I project, the appellant had issued a request for proposal ('RFP') to industry players to participate in a tender exercise to construct, operate and maintain a large scale solar photovoltaic plant. There were multiple RFPs issued for

the separate and distinct phases within the LSS project. The respondent had participated in the RFP for the first phase of the LSS project, 'LSS-1' ('RFP 1'), as the corporate vehicle for the successful bidders of the LSS-1 ('consortium'). Nonetheless, the respondent was bound by the terms and obligations as set out under the RFP 1, read together with the: (i) Solar Power Purchase Agreement ('SPPA') which was entered with the Tenaga Nasional Bhd ('TNB'); and (ii) land lease agreement which stipulated that the respondent was the party solely responsible for identifying, on behalf of the consortium, any land to be made as the project land for the LSS-1 project and, for procuring a 23-year lease in respect of the said land ('lease'). The respondent successfully identified a land located in Kedah ('project land'), which was owned by the Ministry of Defence ('Government'). However, only a lease term of three years was successfully obtained by the respondent. This prompted the appellant and the financier of the project to respectively place an additional specific condition precedent upon the respondent, which among others, for the respondent to expeditiously secure the lease from the Government, before a letter of award for the LSS-1 project could be awarded, and before any drawdown for the LSS-1 project could be allowed. The respondent undertook to give effect to these. The LSS-1 award was thereafter awarded to the respondent. The LSS-1 award imposed on the respondent the following terms, *inter alia*: (i) the respondent must achieve the financial closing date ('FCD') (secure project financing which was already ready for initial drawdown) by 30 July 2017; and (ii) the respondent must achieve the commercial operation date by 31 December 2018 ('COD'). Other than that, it was also mutually understood between the parties that time was of the essence and the contractual relationship among them would always be constrained by a distinct and definite contractual time. Nevertheless, the respondent subsequently failed to obtain the lease from the Government. This was despite four conditional extensions of time ('CEOTs') had been granted by the appellant. There were also extensions given for the FCD dateline, the last being until 31 May 2018 ('final FCD date'), but the COD dateline was maintained. The repeated failure by the respondent caused the appellant to withdraw and terminate the LSS-1 award. The respondent, dissatisfied, initiated an action against the appellant at the High Court on the ground that the withdrawal and termination of the LSS-1 award was unlawful. The respondent staked its claim upon these contentions: (i) pursuant to s. 33 of the Contracts Act 1950 ('CA'), it was incumbent upon the appellant to wait for the Government to grant the lease to the respondent because the performance of the LSS-1 award was contingent upon the contingency which was 'out of the respondent's control'; (ii) due to the granting of the CEOTs, the appellant was estopped from denying that time was already at large; and (iii) due to the granting of the CEOTs, the appellant had acted in manners which led the respondent to legitimately expect that the appellant shall wait until the contingency to occur. In allowing the said

A action, the High Court Judge ('HCJ') held that: (i) the LSS-1 award was a contingent contract (primarily on the condition precedent for the respondent to obtain the lease and achieve the FCD within time); and (ii) referring to ss. 32 and 36 of the CA, contractual time limitations should not bar performance of a contract, when the contract was still possible to be B performed *albeit* outside the contractually agreed time ('HCJ's decision'). Aggrieved, the appellant filed the present appeal. Among the issues raised were: (i) whether the LSS-1 award was a commercial contract hence, could not be a contingent contract; (ii) whether the respondent's reliance on s. 33 of the CA was misplaced; (iii) whether the HCJ erred in his interpretation C of s. 36 of the CA, by removing all stipulations regarding time within the said section; (iv) whether it was incumbent upon the appellant to wait until the Government grant the lease because 'it was out of the respondent's control'; (v) whether the allowance of the CEOTs by the appellant caused time to already be at large; and (vi) whether the appellant had acted in manners which the respondent could legitimately expect the appellant had accepted D the respondent's late performance in procuring the lease.

Held (allowing appeal with costs)
Per Azimah Omar JCA delivering the judgment of the court:

(1) There was a clear misunderstanding of the definition and nature of a E contingent contract by the appellant. It was clearly wrong for the appellant to contend that a commercial contract could not be a contingent contract. A contingent contract does not derive its nature from the subject matter of the contract, but rather from the terms of a contract (which carried conditions and contingencies). A contingent F contract simply means a contract that its performance (or enforceability or validity) was subject to contingency(ies) or condition(s). This is literally prescribed in s. 32 of the CA. In direct application to the present appeal, the appellant agreed to proceed with the LSS-1 award if the respondent managed to achieve FCD (and obtain the lease) within the final FCD date. It was clear that the LSS-1 award was a contingent G contract with stipulation of time. (paras 30 & 31)

(2) The respondent was desperately clinging onto s. 33 of the CA as it contains elements of 'uncertainty' of future events which arguably was 'out of the respondent's control'. However, the reliance was plainly H wrong. Section 33 of the CA does not at all have any stipulation as to the time that an event or contingency must occur. This was clearly reflected in the illustrations under the same provision. The illustrations only dealt with the 'postponement' of a contingent contract's enforceability until the contingency occurs. Succinctly, s. 33 only I applies in instances where the enforceability of a contingent contract was conditional upon a contingency without any set time limit or deadlines. However, the facts of the appeal were entirely different and

incompatible to be examined under s. 33. The LSS-1 award was not only contingent to the obtainment of the lease (and achieving FCD) but was also contingent to the obtainment of such within a specific contractual time limitation. Hence, s. 36 of the CA, being a specific provision dealing with a contingent contract where time is of the essence, was applicable and not s. 33. (paras 34, 35 & 40)

(3) The HCJ's brief examination of s. 36(1) of the CA had unfortunately yielded a completely erroneous reading of the law. Somehow the essence of time had been omitted, and reliance was only placed on the essence of possibility within the said provision. The two provisos under s. 36(1) must be read disjunctively. The first proviso specifically and exclusively concerns time. It plainly stipulates that a contract becomes void if the event (in this case the FCD) was not achieved within the contract's stipulated time period. This interpretation remains unshaken notwithstanding even if the FCD (the lease) was still possible to be achieved or obtained after the contractual time. Whereas the second proviso only concerns contracts where the event could be identified to be impossible to perform before the expiration of the contractual time. The manner of 'possibility' in the second proviso had no relevance to the present appeal whatsoever. The misinterpretation would absolutely diminish the statute's spirit and the party's autonomy and intent to have time to be of the essence. If such misinterpretation was subscribed, then any and all contract would be at large as any party must accept all late (and out of time) performance of the contract so long as the performance of the contract was still possible. (paras 42-45 & 47)

(4) It was plain and simple that the respondent had unequivocally undertaken the contractual responsibility to obtain the lease (and achieve FCD) within the final FCD date. Whatever problem the respondent might face in procuring the LLA was not at all the appellant's concern. Uncertainty and risk are the essences of commerce. The respondent promised to achieve as said despite knowing the risk that the Government might not align with the respondent's contractual time. When the risk ran against the respondent, it could not now blame their inability to deliver on its promise as the respondent had taken that risk upon itself. The respondent also could not expect the appellant to forever extend their 'generous' discretion beyond the contractual timeline that the same had already placed (and agreed by the respondent). (para 50)

(5) The HCJ and the respondent failed to appropriately appreciate the fact that each of the CEOTs had stipulated specific and strict deadlines for the respondent to adhere to. In fact, none of the CEOTs had allowed for any extension of time for the COD date. Thus, despite the conditional extensions granted for the FCD date, the appellant had always remained

resolute that the LSS-1 should be commercially operative by the exact COD date agreed under the LSS-1 award. Therefore, it would be grossly wrong to infer that the appellant had abandoned any conditions as to time considering the uncontroverted fact that the same remained unmoved in respect of the COD date. It would also be remiss to ignore the fact that the CEOTs were all conditional extensions of time which did not at all purport to leave time at large. The CEOTs had always substituted the prior deadline with new specific and strict contractual deadlines. In such a case, it is a trite principle that the CEOTs did not render the time to be at large. (paras 53 & 54)

(6) The appellant had not conducted itself in manners that would have led the respondent to legitimately expect that the appellant would 'accept' late performance of the LSS-1 award beyond the final FCD and COD dates. Even if the parties mutually understood the complexity and time required to execute the project, it did not automatically mean that the parties would wait *ad aeternum* until the respondent would be able to deliver its bargain (beyond any time frame contractually agreed upon). Instead, it simply meant that if the respondent was not able to secure the lease within the set contractual period, then the appellant should not be legally expected to eternally wait until the respondent could do so (and thereby the appellant was at liberty to terminate the LSS-1 award). The appeal was therefore allowed with costs of RM40,000. (paras 56, 57 & 63)

Case(s) referred to:

Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1959] CLJU 3; [1959] 1 LNS 3 PC ***(refd)***

Amarjit Singh Kartar Singh v. Kung Boon Chin & Ors [2010] CLJU 376; [2010] 1 LNS 376 HC ***(refd)***

Ibsul Development (SEL) Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor [2016] CLJU 772; [2016] 1 LNS 772 HC ***(refd)***

Loke Yuen Cheng & Anor v. Vimtex Sdn Bhd [1998] 4 CLJ 352 CA ***(refd)***

National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] CLJ (Rep) 282; [1983] 2 CLJ 76 FC ***(dist)***

Legislation referred to:

Contracts Act 1950, ss. 32, 33, 36(1)

For the appellant - M Ramachelvam, Dir Heizwan Abd Halim, Amierul Razzi Ahmad Yusof & Nurul Syuhada Abdullah; M/s Manjit Singh Sachdev Mohammad Radzi & Pts

For the respondent; Prem Anand THeruvengadam & Joseph Michael Raju Joseph Alexander; M/s Deol & Gill

[Editor's note: For the High Court judgment, please see Strong Elegance Sdn Bhd v. Suruhanjaya Tenaga [2023] CLJU 825; [2023] 1 LNS 825 (overruled).]

Reported by Syamim Ariffin

JUDGMENT

Azimah Omar JCA:

Introduction

[1] The appeal before us is a case of breach of contract and it is essentially concerning a miscomprehension of the tenets or workings of a 'contingent' or 'conditional' contract under s. 32 and s. 36 of the Contracts Act 1950 where the validity or continuity of a contract was contingent or conditional upon the respondent upholding its end of the bargain within a contractually agreed time.

[2] Before us, a contract is entered between the appellant and the respondent which contractually requires the respondent to perform a certain obligation within a set contractual time period. The respondent was unable to perform the said obligation within the prescribed contract period.

[3] At the outset, it is our view that the learned High Court Judge ("learned judge") had misread s. 32 and s. 36 of the Contracts Act 1950 and had incorrectly held that when the parties agreed to the said time contingency or time condition, it was incumbent upon the parties to elect to continue with the contract so long as the contingency or condition was 'possible to be performed' (*albeit* out of contractual time). The reading of the provisions by the learned judge in such manner, in our view was entirely contradictory to the literal stipulations of the provisions. We identified that this incorrect reading was also influenced by the respondent's misconceived reliance of s. 33 of the Contracts Act 1950 which was entirely inapplicable in the appeal before us.

[4] Before we embark in demystifying this misinterpretation of both law and fact, it is only apposite that we appreciate the factual matrix of the case leading up to this Appeal.

Facts Of The Case

[5] Under the 11th Malaysian Plan, the Government of Malaysia was committed to reduce its carbon footprint (and emission) by increasing the use of renewable energy. One such renewable energy being solar energy. The Energy Commission/Suruhanjaya Tenaga ("the appellant") was the statutory body established under the Energy Commission Act 2001 by the Government of Malaysia to undertake initiatives to increase the capacity of large scale solar photovoltaic installations to achieve the government's zero emission target ("the LSS project").

[6] Beckoned by the LSS Project, the appellant had issued a request for proposal ("RFP") to the industry players in Malaysia to participate in a tender exercise to construct, operate and maintain a large scale solar photovoltaic plant ("LSSPVP").

[7] We must be appropriately minded that there were multiple RFPs issued for separate and distinct phases within the LSS project. In total, there were four phases within the LSS project being LSS-1, LSS-2, LSS-3, and LSS-4.

[8] Strong Elegance Sdn Bhd ("the respondent/SESB") participated (as the designated corporate vehicle representing the successful bidder) in the RFP for LSS-1. The subject LSS project in the appeal before is LSS-1. Thus, we are aware that the respondent had wrongly referred to and related matters in LSS-3 despite the subject LSS in the appeal before us was only LSS-1.

[9] SESB was incorporated to undertake the LSS-1 project on behalf of the successful bidders for LSS-1 (who were also shareholders of SESB) namely Synergy Generated Sdn Bhd, Scomi Group Berhad, and Lembaga Tabung Angkatan Tentera (collectively referred to as "the consortium").

[10] The RFP for LSS-1 under RFP: ST(IP/JPIKSE/PI)19/1/4 ("RFP 1") was issued by the appellant on 26 May 2016. RFP 1 calls for bidders for the construction, operation, and maintenance of a LSSPVP of 30MW capacity. Apart from the terms stipulated under the RFP 1, the terms and obligations of parties are to be collectively read together with 1) the solar power purchase agreement with Tenaga Nasional Berhad ("SPPA") and 2) the land lease agreement of at least 23 years of the project land ("LLA") to be identified by the successful bidder (the respondent):

> PART 2 - Project Document
>
> 1.0 Project Document
>
> The Project Document which will be entered into by each Successful Bidder include:
>
> - Solar - Power Purchase Agreement (SPPA),
> - Land Lease Agreement (LLA), where applicable; and
> - any other document which is deemed necessary.

[11] It was resolutely clear under cl. 4.7.1 of RFP 1 that the party solely responsible to ensure that an LLA for 23 years was obtained for the project land Was The Respondent (as the consortium's corporate vehicle):

> 4.7.1 Rights to Use of Land
>
> The Bidder shall provide evidence that the site for the LSSPV Plant as per requirement of the Plant is under clear possession of the Bidder or the Bidder has the legal right to use the site. The Bidder shall furnish the following documentary evidences and information:

[12] The contractual period for the production and sale of solar energy to TNB under the SPPA was for 21 years. Thus, it was mutually understood

by both the appellant and respondent that it was incumbent upon the respondent to obtain a LLA from the landowner (of the project land) for at least a 23 years' period:

> 2.0 Capacity Packages for The RFP
>
> This Large Scale Solar PV Plants RFP is an invitation for Bids from Qualified Participants who are eligible and have been selected in the pre-qualification exercise conducted by ST in March 2016 to finance, design, supply, build, own, operate and maintain Large Scale Solar PV Plants to supply and sell energy produced by the PV solar plants to the electricity supply utilities in Peninsular Malaysia or Sabah and Pulau Labuan under long term power purchase agreements. A Successful Bidder will be required to entered into a power purchase agreement for a term of 21 years with the electricity supply utility.

[13] The consortium submitted its bid for LSS-1 on 22 September 2016, upon which the appellant had accepted the consortium's bid *via* its letter of acceptance dated 15 December 2016 ("2016 LOA").

[14] In the meantime, the consortium (*via* the respondent) also entered into the SPPA dated 27 March 2017 with TNB. Clause 3.1(e) of the SPPA also expressly stipulated a condition precedent that the respondent was solely responsible to ensure the procurement of the requisite 23 years' LLA for the project land:

> (e) SPP has submitted to TN8 and the Suruhanjaya Tenaga, one (1) certified copy of the executed Site Agreement which is In full force and effect and all conditions precedent to its effectiveness are satisfied or waived thereunder; and

[15] Before any letter of award was issued by the appellant to the respondent as the consortium's corporate vehicle (in furtherance of the successful *bid*), there arose a crucial issue as to the respondent's identified project land. The respondent had identified a land known as PT 2, HS (D) 76387, Bandar Sungai Petani, Daerah Kuala Muda, Kedah ("project land"). Although the mutually agreed project period was at least 23 years, the respondent (the consortium) had only managed to obtain a three years' lease from the Ministry of Defence. This would clearly put the entire LSS-1 at grave risk as the respondent would only legally have three years' worth of rights and access over the project land despite the intended contractual period of 23 years (a 20 years less than what was required):

> Permohonan Penyewaan Tanah Milik Persekutuan Kegunaan Kementerian Pertahanan Malaysia Di Atas PT 2, H.S.(D) 76387, Bandar Sungai Petani, Daerah Kuala Muda, Kedah Bagi Tujuan Pembangunan 30MW Tenaga Boleh Diperbaharui (Solar) Seluas 301.3708 Ekar Oleh Strong Elegance Sdn Bhd
>
> Dengan hormatnya saya diarah merujuk perkara di atas.

2. Sukacita dimaklumkan bahawa Mesyuarat Jawatankuasa Penyurusan Tanah (Khas) Kementerian Pertalianan Malaysia pada 05 April 2017 telah meluluskan secara dasar permohonan pihak tuan bagi sewaan tanah berkenaan tertakluk kepada syarat-syarat beriku:

(i) Kelulusan dasar adalah untuk tempoh enam (6) bulan berkuatkuasa dari 1 Mei 2017 sehingga 31 Oktober 2017 bagi pihak tuan menyediakan dan mengemukakan pelan Kebenaran Merancang/ Pembangunan (DO) kepada Majlis Perbandaran Sungai Petani (MPSPK);

(ii) Penyewaan adalah untuk tempoh selama Tiga (3) Tahun yang akan berkuatkuasa pada 1 November 2017 sehingga 31 Oktober 2020 tertakluk kepada kelulusan daripada MPSPK;

[16] Understandably, the appellant had, *via* its letter dated 7 April 2017 ("CP letter"), raised its concern over the non-fulfilment of the terms in RFP 1, the 2016 LOA, and the SPPA by the respondent (the consortium). Due to the insufficient lease term obtained by the respondent, the appellant had duly placed additional specific conditions precedent for the respondent to abide by before the appellant would issue an award to the respondent:

(4) Oleh yang demikian, dengan hanya mengemukakan dokumen perjanjian sewaan yang mempunyai tempoh hanya tiga tahun, Strong Elegance Sdn Bhd didapati tidak mematuhi Syarat Duluan seperti dinyatakan dalam perkara 3 di atas. Seterusnya, sekiranya Syarat Duluan ini tidak dapat dipenuhi dalam masa yang ditetapkan, SPPA tersebut akan terbatal.

(5) Bagi memastikan effectiveness SPPA dapat dicapai dan projek dapat dilaksanakan dalam masa yang dijadualkan, pihak Strong Elegance Sdn Bhd adalah diminta untuk melaksanakan perkara berikut:

(i) melanjutkan tempoh sah laku Bid Bond [Ref: 99010BGU6168327] yang tamat tempoh sah laku pada 22 April 2017 kepada 4 Jun 2017;

(ii) mengemukakan dokumen Bid Bond yang telah dilanjutkan tempoh sah laku seperti diminta dalam perkara 5(i) di atas kepada Suruhanjaya pada atau sebelum 14 April 2017; dan

(iii) memuktamadkan perjanjian tanah yang mempunyai tempoh sekurang-kurangnya selama 21 tahun selepas Commercial Operation Date dan mengemukakan dokumen perjanjian tersebut kepada Suruhanjaya Tenaga pada atau sebelum 4 Mei 2017;

Letter of Award hanya akan dikeluarkan kepada Strong Elegance Sdn Bhd selepas dokumen perjanjian tanah dimuktamadkan dan dikemukakan kepada Suruhanjaya Tenaga dalam tempoh yang ditetapkan.

[17] The respondent, in its letter dated 13 April 2017 ("CP acceptance") *inter alia*:

(i) admitted that the respondent had not fulfilled the terms and condition precedent under the RFP 1 and the 2016 LOA by failing to obtain a 23 years' lease period over the project land; and

(ii) undertook and agreed to the conditions precedent placed by the appellant to ensure that the respondent would expeditiously secure the LLA for 23 years from the Ministry of Defence:

> Pihak kami sedia maklum akan kepentingan perjanjian ini dan sedang berusaha sedaya-upaya untuk mempercepatkan proses perjanjian. Memandangkan proses ini melibatkan pelbagai pihak iaitu Tentera Darat, Kementerian Pertahanan serta JKPTG. segala urusan perlu di lakukan secara terperinci dan mengikut prosedur tertentu. Untuk makluman tuan, pihak kami kini sedang berurusan dengan Kementerian Pertahanan dan JKPTG untuk mempercepatkan proses pajakan 23 tahun tersebut.
>
> Kami juga perlu melalui proses yang melibatkan UKAS memandangkan projek ini melibatkan kerjasama antara Strong Elegance Sdn Bhd dan Tentera Darat (TO) dalam bidang Renewable Energy dengan penggunaan tanah TD.

[18] In view of the respondent's admission and agreement to undertake the conditions precedent, the appellant awarded the LSS-1 project to the respondent *via* the letter of award dated 2 May 2017 ("LSS-1 award"). The pertinent terms of the LSS-1 award *inter alia* were as follows:

(i) Time Is Of The Essence;

(ii) clause 4(i) of the LSS-1 award: The respondent must achieve financial closing date ("FCD") (secured project financing which was already ready for initial drawdown) by 30 July 2017 ("FCD date");

(iii) clause 4(h) of the LSS-1 award: The respondent must achieve commercial operation date ("COD") by 31 December 2018 ("COD date"); and

(iv) clause 5 of the LSS-1 award: The respondent must replace the RM1 million bid bond with a substitute bond of RM10 million by 19 May 2014 ("SB date").

[19] It was plain and obvious that all parties have mutually understood that their contractual relationship shall always be constrained by a distinct and definite contractual time.

[20] Apart from the RFP 1, the 2016 LOA, and the SPPA's terms with TNB, it was also crucial to understand that the respondent's sole contractual duty and responsibility to obtain the 23 years' LLA was also critical in order for the respondent to ever achieve FCD. It remained undisputed that the financier secured by the respondent was also concerned with the respondent's precarious position in only securing a short-term lease of three years for the intended 23 years' project period. Thus, even the financier similarly required the respondent to appropriately secure the 23 years' LLA from the

Government of Malaysia. The financier placed its own condition precedent upon the respondent to obtain the LLA before the financier would allow any drawdown for the LSS-1 project. This condition precedent was placed by the financier *via* the financier's solicitors' letter dated 4 June 2018:

One of the conditions precedent in order to achieve financial close of the Facilities is extension the lease over project land for 23 years, and one of the utilisation conditions of the Facilities is registration of the lease over project land. The Financiers have been informed that the registered lease over the project land has yet to be issued by the relevant land authority as at the date hereof.

Yours faithfully,

Shearn Delamore &co

[21] Thus, the respondent's contractual obligation to timeously obtain the LLA was clearly important not only to the appellant, but also to the respondent's financier as such uncertainty of continued access and control of the project site would certainly put the entire LSS-1 project at grave risk of failure and loss. Therefore, it should have been immensely clear to all parties (especially the respondent) that proper certainty *via* the LLA should be promptly obtained by the respondent within time so as to enable the project to proceed at a more solid and firm footing.

[22] And this common and mutual need of timeous and prompt certainty remained unchanged and uncontroverted for the entire life of the LSS-1 award from the time it was awarded to the respondent, until the time it was withdrawn by the appellant (due to the respondent's continued failure to obtain the LLA within the set contractual time).

The Respondent's Repeated Continuous Breach Of The RFP 1, LSS-1 Award, And The SPPA & The Appellant's Conditional Extensions Of Time

[23] It was readily admitted by the respondent that the respondent had to repeatedly seek for time extensions from the appellant to extend the FCD deadline and the COD deadline as the respondent was unable to obtain the requisite LLA (as per their own promise and agreement to do so within time).

[24] The appellant's kind discretion and patience were repeatedly stretched far too thin only for the respondent to continue its series of failure to deliver its end of the bargain. In total, the appellant (at the respondent's requests) had granted four Conditional Extensions of time ("conditional EOT's") in which the appellant had extended the FCD date to Specific New Deadlines. Upon the fourth and last of the conditional EOTs, the appellant had extended the FCD date from 30 July 2017 to 31 May 2018 ("final FCD date"). The

appellant Never Allowed Any Extension Of The Cod Date and thus, had always maintained that time is of the essence and that the respondent was still expected to achieve COD within the original COD date agreed under the LSS-1 award.

[25] It must be kept in mind that LLA for LSS-1 award (for the LSS-1 project) Even To Date Had Never Been Obtained By The Respondent. The respondent had only obtained LLA for LSS-3 on 25 February 2019. Thus, the immutable truth was that even past the expiration of the final FCD date, the respondent had maintained its streak of breach and failure to obtain the requisite LLA (for LSS-1) to achieve FCD.

[26] In view of the respondent's admitted continuous breach of the LSS-1 award, the appellant was at liberty to elect to either allow any further extension, or to terminate the LSS-1 award. As the respondent had already flouted all specific deadlines for the fourth time around, it was only commercially sensible for the appellant to withdraw the LSS-1 award and cease dealing with the non-performing respondent. Indubitably, the appellant *via* its letter dated 12 July 2018 to the respondent, had withdrawn the LSS-1 sward ("withdrawal letter").

The Respondent's Peculiar Claim Before The High Court

[27] Despite the respondent's slew of repeated breach of the LSS-1 award, the respondent commenced an action against the appellant claiming that the appellant's withdrawal and termination of the LSS-1 award was unlawful. By and large, the respondent staked its claim on these contentions:

(i) it was incumbent upon the appellant under s. 33 of the Contracts Act 1950 to wait for the Government of Malaysia to grant the LLA to the respondent ("the contingency") because the performance of the LSS-1 award was contingent to the contingency which was 'out of the respondent's control';

(ii) due to the granting of the conditional EOTs, the appellant was estopped from denying that time was already at large; and

(iii) due to the granting of the conditional EOTs, the appellant has acted in manners which lead the respondent to legitimately expect that the appellant shall wait until the contingency to occur.

[28] The learned judge however in our view, had unfortunately embarked on his own tangent much different than the contentions of all the parties. The learned judge instead referred to ss. 32 and 36 of the Contracts Act 1950. In referring to these two provisions, the learned judge had reached the incorrect reading and interpretation of the provisions and the principles governing contingent (or conditional) contracts with stipulations as to time:

(i) the learned judge initially correctly assessed that the LSS-1 award was a contingent contract (primarily on the condition precedent for the respondent to obtain the LLA and achieve FCD within time);

(ii) however, his analysis took a wrong turn when he wrongfully removed all stipulations regarding 'time' within s. 36 of the Contracts Act, and wrongly shifted the rule to only look at 'possibility to perform'; and

(iii) the learned judge erroneously concluded that contractual time limitations should not bar performance of a contract, when the contract was still possible to be performed *albeit* outside the contractually agreed time:

> 32. Reading both this provisions it is clear that a contingent or conditional contracts become void if the contingent event becomes impossible to perform. However, if the events can be achieved but not within the specified time then the under the law this contract can still be enforced under the law.

Our Analysis And Findings

[29] From the outset, we are of the considered view that this appeal must be allowed as the incorrect interpretation of the law by the learned judge was significantly contradictory to rudimentary principles of time in contracts, and would have led to an undesirable precedent which would render any time stipulations within a contract to be meaningless. Contracts do not only consider the 'possibility of performance of a contingency' but also the time limit in which a contingency was required to be performed. If possibility was the only consideration in determining the validity of a contract, then any unfortunate party would be forced to accept late performance of a contract, even if the late performance was 'still possible' a whole century after the lapsing of the contractual time. A precedent and principle which was clearly illogical both by law and fact. This certainly could not have been the intention of the Parliament when drafting the Contracts Act 1950.

[30] As a preliminary point, it must be pointed out here that the appellant's contention in para. 39 of their written submission in reply which insisted that the LSS-1 award was not a contingent contract but instead was a 'commercial' contract was misconceived. In our view, this contention by the appellant was a clear misunderstanding of the definition and nature of a contingent contract. It was clearly wrong for the appellant to contend that a commercial contract cannot be a contingent a contract. A contingent contract does not derive its nature from the subject matter of the contract but instead it derives its nature from the terms of a contract (which carries conditions and contingencies). A contingent contract simply means a contract that it's performance (or enforceability or validity) was subject to contingency(ies) or condition(s). This is literally prescribed in s. 32 of the Contracts Act 1950:

> 32. A "contingent contract" is a contract to do or not to do something, if some event, collateral to the contract, does or does not happen.
>
> ILLUSTRATION
>
> A contract to pay B RM10,000 if B's house is burnt. This is a contingent contract.

[31] In direct application to the appeal before us, the appellant agreed to proceed with the LSS-1 award, if the respondent manages to achieve FCD (and obtain the LLA) within the final FCD deadline. Clearly, here that the LSS-1 award was indeed a contingent contract with stipulation of time.

[32] Section 32 of the Contracts Act 1950 is only a general provision defining a contingent or conditional contract. It must be understood that there exist specific provisions within the Contracts Act 1950 catering to specific and distinct forms or nature of contingent contracts.

[33] We are most aware that the respondent had contended ad nauseam that the LSS-1 award falls within the category of contingent contracts governed under s. 33 of the Contracts Act 1950. This provision reads as follows:

> Enforcement of contracts contingent on an event happening
>
> 33. (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> (b) If the event becomes impossible, such contracts become void.
>
> ILLUSTRATIONS
>
> (a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.
>
> (b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.
>
> (c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

[34] The respondent was desperately clinging onto this provision as this provision contains elements of 'uncertainty' of future events which arguably was 'out of the respondent's control'. But the respondent's reliance on s. 33 was plainly wrong. Section 33 of the Contracts Act does not at all have any stipulation as to time that an event or contingency Muct occur. This was clearly reflected in the illustrations under the same provision. The illustrations only dealt with the 'postponement' of a contingent contract's enforceability until the contingency occurs. Succinctly, Section 33 only applies in instances where the enforceability of a contingent contract was conditional upon a contingency Without Any Set Time Limit Or Deadlines.

[35] But the facts of the appeal before us were entirely different and incompatible to be examined under s. 33 of the Contracts Act. The LSS-1 award was not only contingent to the obtainment of the LLA (and achieving FCD). Instead the LSS-1 award was contingent to the obtainment of the LLA (and achieving FCD) Within A Specific Contractual Time Limitation.

[36] The burning issue in this appeal was the respondent's continued failure to adhere to the time conditions of the LSS-1 award and not at all concerning the time when the appellant can enforce the LSS-1 award. The LSS-1 award was already in operation and was already underway in its performance.

[37] The respondent incessantly relied upon the Federal Court's decision in *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] CLJ (Rep) 282; [1983] 2 CLJ 76; [1983] 2 MLJ 211 despite the fact that the factual matrix and the principles within *Sharidal*'s case was entirely distinct, distinguishable, and irrelevant to the present case. In *Sharidal* (*supra*), the FC dealt with the issue of the enforceability of a SPA where the SPA was subject to the approval of the authorities (the foreign investment committee ("FIC")). There Was No Issue Or Stipulation Whatsoever As To Any Time Limit For The FIC Approval To Be Obtained.

[38] The niche issue in *Sharidal* was the parties' dissonance as to the finality of the FIC's rejection or non-approval. The FC embarked to demystify the enforceability of the SPA in the context of the question whether the FIC's rejection was a full rejection or a conditional rejection. The 'postponement' in *Sharidal* had nothing at all to do with any time stipulation. Instead, the parties there were arguing whether or not parties had to 'further wait' until the FIC's rejection was absolute and whether the SPA's termination was 'premature'.

[39] It is exceedingly and glaringly obvious that the principle in *Sharidal* was absolutely irrelevant and inapplicable to the appeal before us. The respondent's reliance on s. 33 of the Contracts Act 1950 was utterly misconceived. Section 33 was entirely irrelevant as it only dealt with contracts conditional to the occurrence of an uncertain event (Without Any Stipulation Of Time). Of course, if the contract was conditional to an event happening with time at large, then the time to perform the contract shall be 'postponed' until the occurrence of the event.

[40] But this was not at all the case in the present appeal. This appeal concerns a contract that is conditional to the occurrence of an event Within A Set Time. And the specific provision dealing with such contract when time is of the essence would be s. 36 of the Contracts Act 1950 and not s. 33.

[41] In actuality, the Contracts Act 1950 already prescribed the rules that govern specific contingent contracts which contain specific stipulations as to time (or time limitation for a contingency to occur). That specific provision would be s. 36 of the Contracts Act 1950:

> When contracts become void which are contingent on happening of specified event Within Fixed Time
>
> 36. (1) Contingent contracts to do or not to do anything if a specified uncertain event happens Within A Fixed Time become void if, at the expiration of the time fixed, the event has not happened, or if, before the time fixed, the event becomes impossible.

Illustrations

(a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

[42] The learned judge's brief examination of s. 36(1) of the Contracts Act 1950 had unfortunately yielded a completely erroneous reading of the law. Somehow the learned judge had omitted the essence of time and had only placed reliance on the essence of possibility within the provision.

[43] It must be properly understood that the two provisos in s. 36(1) of the Contracts Act Must Be Read Disjunctively:

Limbs	
1st limb	Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time Become Void F...
2nd limb (1st proviso)	at the Expiration Of The Time fixed, the event has not happened, Or ...
3rd limb (2nd proviso)	before the time fixed, the event becomes impossible.

[44] It can be literally understood that the first proviso of the provision does not concern at all whether or not the event was possible or otherwise. The first proviso specifically and exclusively concerns about time. Thus, the first proviso plainly stipulates that a contract becomes void if the event (in this case the FCD) was not achieved within the contract's stipulated time period. This interpretation remains unshaken notwithstanding even if the FCD (the LLA) was still possible to be achieved or obtained after the contractual time.

[45] The second proviso only concerns contracts where the event can be identified to be impossible to be performed before the expiration of the contractual time. The manner of 'possibility' in this second proviso had no relevance whatsoever to the present appeal.

[46] It matters not if the LLA may be obtained (or FCD be achieved) even 100 years in the future as it still does not detract from the fact that the LLA was not obtained (and FCD was not achieved) within the contractual time period.

[47] The learned judge's misinterpretation would absolutely diminish the statute's spirit and the party's autonomy and intent to have time to be of the essence. If we were to subscribe to the learned judge's interpretation of the provisions, then any and all contract would be at large as any party must accept all late (and out of time) performance of the contract so long as the performance of the contract was still 'possible'.

[48] We are guided by the Privy Council's decision in the case of *Aberfoyle Plantations Ltd v. Khaw Bian Cheng* [1959] CLJU 3; [1959] 1 LNS 3; [1960] 1 MLJ 47 which had held the following:

> The following general principles are warranted by authority and manifestly reasonable: (i) where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date: (ii) where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time: (iii) where a conditional contract of sale *fixes* (whether specifically or by reference to the date fixed for completion) *the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.*
>
> (emphasis is added)

[49] Mary Lim JC (now FCJ) had applied *Aberfoyle* (*supra*) in Her Ladyship's reported decision in *Amarjit Singh Kartar Singh v. Kung Boon Chin & Ors* [2010] CLJU 376; [2010] 1 LNS 376; [2010] 8 MLJ 149:

> Applying those principles to the facts of this case, **there is no room for suggesting that the conditions precedent may be fulfilled by a time other than the date fixed**, that is, 13 January 2006. The compliance requirements are strict on both parties.
>
> (emphasis is added)

[50] Thus, the respondent's contention on the granting of the LLA being 'out of its control' had no bearing whatsoever in the appeal before us. It was plain and simple that the respondent had unequivocally undertaken the contractual responsibility to obtain the LLA (and achieve FCD) within the final FCD deadline. Whatever problem the respondent might face in procuring the LLA was not at all the appellant's concern. Uncertainty and risk are the essences of commerce. The respondent promised to achieve FCD and obtain the LLA within the final FCD deadline despite knowing the risk that the Malaysian Government might not align with the respondent's contractual timeline. When the risk ran against the respondent, the respondent cannot now blame their inability to deliver on its promise as the respondent had taken that risk upon itself. Nor can the respondent expect the appellant to forever extend their 'generous' discretion beyond the contractual timeline that the appellant had already placed (and agreed upon by the respondent).

[51] At this juncture, we have already unravelled the learned judge's misinterpretation of the law as well as the respondent's misconceived reliance on s. 33 of the Contracts Act 1950. Now, the other contention supposed by the respondent to 'liberate' itself from any time constraints was that 'time was already at large'. The respondent argued that the four conditional EOTs granted by the appellant was somehow 'proof' that either time was no longer of essence, or that the appellant had acquiesced and agreed that it was reasonable for the respondent be afforded additional time to comply with its contractual obligation.

[52] The learned judge also erroneously agreed with the respondent and went on to state that by granting the four conditional EOTs, the appellant must have admitted to the complexity of the LLA approval process.

[53] However, the error and folly in this conclusion were glaring as the learned judge, and the respondent had failed to appropriately appreciate the fact that each of the conditional EOTs had stipulated specific and strict deadlines for the respondent to adhere to. In fact, none of the four conditional EOTs had allowed for any extension of time for the COD date. Thus, despite the conditional extensions granted for the FCD date, the appellant had always remained resolute that the LSS-1 project should be commercially operative by the same exact COD Date agreed upon under the LSS-1 award (being 31 December 2018). Therefore, it would be grossly wrong to infer that the appellant had abandoned any conditions as to time considering the uncontroverted fact that the appellant remained unmoved in respect of the COD date.

[54] It would be remiss if we were to ignore the fact that the EOTs were all Conditional EOTs which did not at all purport to leave time at large. Instead, the conditional EOTs had always substituted the prior deadline with new specific and strict contractual deadlines. In such cases of substitution with new specific deadlines, it has long been a trite principle that such conditional EOTs Do Not Render Time To Be At Large. We are first guided by the decision in *Ibsul Development (SEL) Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor* [2016] CLJU 772; [2016] 1 LNS 772; [2016] MLJU 420:

> Time was always an essence. *Although extensions of time were given, all extensions were given with exact times of payment to be complied with. The effect of giving time extensions does not condemn a contract into a black hole of indefinite time* for a party to perform its obligation as and when a party fancies.
>
> ...
>
> This new extended date becomes a new essence of time in which must be complied with by the parties to the contract. *And failure to comply with this new stipulation and essence of time entails a clear breach to the contract*.
>
> (emphasis is added)

[55] The same sentiment was upheld in the Court of Appeal's decision in *Loke Yuen Cheng & Anor v. Vimtex Sdn Bhd* [1998] 4 CLJ 352; [1998] 4 MLJ 169:

> They did not do anything to encourage the respondent to try to complete after that date. *All that they did was to grant an extension of time to a fixed date (that is 13 January 1993) to complete at the request of the respondent under cl 19. In my judgment, the appellants' conduct was not such as to amount to waiver* within the encapsulation of the principle in the judgment of Goulding J (*Luck v. White* (1973) 26 P & CR 89 at p 96).

A Indeed, if the parties have once made time of the essence of the contract, *the mere extension of the period to a new fixed date would on the authorities have preserved the position that time was of the essence*, without fresh stipulation to that effect by Goulding J in *Luck v. White* at p 95).

Buckley LJ in *Buckland & Ors v. Farmer & Moody* said (at p. 937):

B If a vendor has once made time of the essence of the contract and *then allows a further extension to a fixed date then time remains essential*.

In *Barclay v. Messenger* (1874) 43 LJ Ch 449, MR said (at p. 456):

It appears to me plain that a mere extension of time, and nothing more, *is only a waiver to the extent of substituting the extended time* for the original time, C and *not an utter destruction of the essential character of the time*.

The extension granted to the respondent was an extension to a fixed date so that the time remains essential. In my judgment, the contract was rescinded by the notice to the respondent on 14 January 1993 ...

(emphasis is added)

D

[56] On the same score above, it also cannot be said that the appellant had conducted itself in any manner that would have led the respondent to legitimately expect that the appellant would 'accept' late performance of the LSS-1 award beyond the final FCD date and the COD date.

E **[57]** Even if the parties mutually understood the complexity and the time required to execute the project, it does not automatically mean that the parties would wait *ad aeternum* until the delinquent respondent would be able to deliver its bargain (beyond any timeframe contractually agreed upon). Instead, it simply meant that if the respondent was not able to secure the F LLA for 23 years within the set contractual period, then the appellant should not be legally expected to eternally wait until the respondent can do so (and thereby the appellant was at liberty to terminate the LSS-1 award).

Our Decision And Orders

[58] In view of the above deliberations, we hereby find the following:

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(i) although the learned judge had misinterpreted ss. 32, 33, and 36 of the Contracts Act 1950, the learned judge was still correct to find that the LSS-1 award was a contingent or conditional contract (although not in the manner understood and argued by the respondent);

H (ii) the learned judge had clearly embarked on an erroneous analysis, interpretation, and application of ss. 32 and 36 of the Contracts Act 1950;

(iii) the learned judge had erred in relying on s. 33 of the Contracts Act (which was inapplicable in the appeal before us);

I

(iv) the learned judge had failed to comprehend and appreciate the true interpretation and spirit of s. 36 of the Contracts Act 1950 by omitting and ignoring the very essence of 'time' embedded within the provision;

(v) the learned judge had erred in finding that the granting of the four conditional EOTs would render time to be at large; and

(vi) the learned judge had erred in finding that the appellant had conducted itself in manners which would lead the respondent to have legitimate expectation that the appellant would accept late performance of the LSS-1 award beyond the final FCD date and the COD date.

[59] Despite the fact that the learned judge had concluded the case in error, it was still correct for the learned judge to proceed to decide the matter of liability separately and ahead of the matter of quantum under O. 33 r. 2 of the Rules of Court 2012.

[60] We hereby set aside the learned judge's decision to allow the respondent – plaintiff's claim on liability. In turn, we accordingly find that the respondent – plaintiff's claim was entirely unsustainable and thus, we hereby dismiss the respondent – plaintiff's claim.

[61] There was no reason for us to further delve into the appellant – plaintiff's application for stay of the High Court proceedings ("encl. 3") as the learned judge's decision on liability has already been set aside (and the plaintiff – respondent's claim has already been dismissed). Enclosure 3 is now moot.

[62] We accordingly also set aside the learned judge's decision, order, or direction to proceed with trial as to the matter of quantum.

[63] In view of the above decisions and orders, we hereby allow the appeal. We order costs of RM40,000 (here and below) to be paid by the respondent to the appellant.